Supreme Court, U.S.
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No. 93-794

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

DAVID GILLUM,

Petitioner,

V.

THE CITY OF KERRVILLE, TEXAS, GLENN D. BROWN, IN HIS OFFICIAL CAPACITY AS CITY MANAGER AND IN HIS INDIVIDUAL CAPACITY, LOUIS A. BARROW, JR., IN HIS OFFICIAL CAPACITY AS CHIEF OF POLICE AND IN HIS INDIVIDUAL CAPACITY, AND KIRK MCCARLEY, IN HIS OFFICIAL CAPACITY AS PERSONNEL DIRECTOR, AND IN HIS INDIVIDUAL CAPACITY,

Respondents

On Writ of Certiorari to the
United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT, LOUIS A. BARROW, JR.

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QUESTIONS PRESENTED

1. Whether the Supreme Court should overrule *Connick v. Myers* and *Rankin v. McPherson* to give way to Petitioner's own analytical framework in cases involving freedom of speech within the context of governmental employment.

2. Whether the Court of Appeals followed the decisions in *Connick* and *Rankin* in deciding that the Petitioner was not speaking on a matter of public concern.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

COUNTER STATEMENT OF THE CASE 2

I. REASONS WHY THE WRIT SHOULD BE DENIED 5

A. Introduction 5

B. The Supreme Court Should Not Substitute the Test Proposed by the Petitioner for the *Connick/ Rankin* Standard 6

C. The Opinions of the Federal Courts Are Not Inconsistent. 7

D. The Fifth Circuit's Ruling That the Plaintiff Was Speaking as an Employee on a Matter of Private Concern Is Not Inconsistent with *Connick* and *Rankin*. 9

II. CONCLUSION 12

TABLE OF AUTHORITIES

CASES **PAGE**

Brocknell v. Norton, 732 F.2d 664 (8th Cir. 1986) 10, 11

Buzek v. County of Saunders, 972 F.2d 992 (8th Cir. 1992) 10

Conaway v. Smith, 853 F.2d 789 (10th Cir. 1988) 10, 11

Connick v. Myers, 461 U.S. 138 (1983)..... i, 2, 12, 13

Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,
472 U.S. 749 (1985). 8

Givan v. Western Line Consol. School District,
439 U.S. 410 (1979) 13, 14

Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988) 9

Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992) 10

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993) 9

Rankin v. McPherson, 483 U.S. 378 (1987). ..... i, 5, 7, 11-13

Terrell v. University of Texas Sys. Police, 792 F.2d 1360
(5th Cir.1986), *cert. denied*, 479 U.S. 1064 (1987). 12

Wulf v. City of Wichita, 883 F.2d 842 (10th Cir. 1989) 10

UNITED STATES CONSTITUTION

First Amendment 2, 6, 8, 9, 10

BRIEF OF RESPONDENT, LOUIS A. BARROW, JR.

Respondent, Louis A. Barrow, Jr., submits this brief to demonstrate that the Petition for Writ of Certiorari should be denied.

COUNTER STATEMENT OF THE CASE

The decision of the Court of Appeals accurately states the facts of the case.[1] Respondent makes the following statement to clarify or correct some of the statements expressly or impliedly made in the petition for *certiorari*.

The Petitioner identified the "speech" at issue here as speech that was critical of irregularities he perceived in the investigation of possible wrongdoing by the Chief of Police and of the bias of the assigned investigator. Pet. 27-28. The central issue in the District Court and the Court of Appeals was whether at the time the Petitioner spoke about these matters he was speaking as a citizen on matters of public concern or as a police officer embroiled in a personal dispute over his involvement in the investigation of allegations of misconduct against the Chief of Police. To bring this case within the protection of the First Amendment, the Petitioner attempts to impart a character of "public concern" to his recounting to others of the allegations of misconduct against the Chief of Police and his discontent about the course that his investigation had taken.

In the statement of the case, the Petitioner misleads the Court insofar as he uses the word "report" to imply that Petitioner's speech took the form of an accusation, a charge or complaint of misconduct against Respondent Barrow.[2] This is significant because the Petitioner consistently maintained throughout the proceeding in District Court that he did not go to Lanning, the officer in charge of Internal Affairs, and McCray, his supervisor, to make a complaint against

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[1] The Petitioner covertly recorded most of the conversations during the meetings that are relevant to the disposition of the issues and on which he bases his claims. The transcript of these conversations are at App. 75-157. The facts are not controverted to the extent of what was actually said during such conversations.

[2] *See* Pet. 4,5,6,7,9,11.

Respondent Barrow. The fact that Petitioner did not want to make a complaint, but only sought advice on what to do with his information, sets the tone of the Petitioner's involvement in the investigation and supports the Court of Appeals' finding that the Petitioner was not speaking as a citizen on a matter of public concern.

In the Petitioner's own words, the purpose of his conversations was to "obtain advice" regarding the correct procedure to undertake an investigation. App. 106,119,161,163-164. The following excerpt from the conversation between the Petitioner and McCarley better exemplifies what was implicated in Petitioner's "speech." The statements were made during a meeting between the Petitioner and McCarley on August 6, 1990, four days after Petitioner surrendered his badge and weapon.[1] The Petitioner went to McCarley to inquire about his status as an employee. App. 170-171. Several times, Petitioner said that he did not make a complaint against Barrow. App. 142, 142-143, 145, 147. He also said that he went to Lanning for advice, App. 144, and that:

> "... if in fact, the Chief is guilty, if in fact, the Chief is innocent, I wanted to make sure that I was doing the right procedures in my investigation. When I had the whatever evidence or lack of evidence considering Joe knew about it, I would have given it to him. Then he could have taken off with the investigation and done whatever internal affairs do with it."

App. 144. McCarley then said:

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[1] The Court of Appeals found that whether the Petitioner quit his job when he surrendered his badge and weapon or whether he was discharged for insubordination was a question of fact. App 10.

> "You should have come up to Joe and said like I have heard these rumors and I would like a formal investigation to be done on this particular case and that is the proper channels."

To which Petitioner remarked:

> "Well, that's not what is in the handbook. And that is not what is in our code. Uh ....or .. rules and regulations. I have never signed any forms saying that I am making an official complaint against the Chief. I have never had anything notarized." App. 144-145.

When McCarley asked why he did not file a complaint, the Petitioner said "[B]ecause I am going to find out before I file a complaint. . . . I'm going to investigate first . . . [Y]ou have to have probable cause." App. 150.

The Petitioner was allowed to investigate. App. 3. After Lanning relieved the Petitioner and Lanning took over the investigation, the Petitioner refused to cooperate with him. On two different occasions the Petitioner refused to reduce to writing what he knew about his investigation. App. 94-94,96-99. This led to the verbal confrontation on August 2, 1990 where the Petitioner again refused to cooperate, App. 119-120, and which culminated in the Petitioner surrendering his badge and weapon. App. 4-5. After several administrative hearings, on October 22, 1990, the City of Kerrville offered the Petitioner reinstatement without compensation for the time off duty. App. 6,175-176. The Petitioner was not satisfied and filed suit. App. 6.

III.
REASONS WHY THE WRIT SHOULD BE DENIED
A.
INTRODUCTION

As the first reason for review, the Petitioner challenges the wisdom of *Connick v. Myers*[1] and *McPherson v. Rankin*[2] on the basis that this Court's legal precedents are confusing. Petitioner proposes that the Court substitute the *Connick* "public concern inquiry" for the inquiry of whether speech "clearly impairs" the government's ability to function. The Petitioner suggests that "impairment" would be found when the speech would make it "impossible" for a government institution to carry out its duties or accomplish its legitimate objectives.[3] The Petition is without any coherent explanation of how this new approach in First Amendment questions will make the outcome more predictable and consistent in the difficult area of government employment speech. The argument is flawed, however, because, in its application, it ignores the purpose and values underlying the free speech clause.

The Petitioner argues that the Courts of Appeals' cases cited in the Petition are in conflict because the lower courts have applied a confusing standard. The cases are not in conflict and the opinions are reconcilable. These decisions reflect the application, in close cases, of a fact-sensitive standard. Difficulty, however, cannot be the sole consideration in deciding whether to modify or substitute, as Petitioner suggests, the public concern inquiry as a threshold question.

The writ should be denied because the analysis employed in the decision of the Court of Appeals does not conflict

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[1] 853 U.S. 138 (1983).
[2] 483 U.S. 378 (1987).
[3] Pet. 45.

with the decisions of this Court in *Connick* and *Rankin*. The Petitioner argues that the Court of Appeals may have erred in the proper application of the *Connick* and *Rankin* balancing test because of the confusion caused by the lack of clear guidelines in making the threshold inquiry.[1] The case at bar, as the same Courts of Appeals cases cited by the Petitioner, is the result of the application of the correct legal standard to a set of facts that is very particular to each case.

B.

THE SUPREME COURT SHOULD NOT SUBSTITUTE THE TEST PROPOSED BY THE PETITIONER FOR THE *CONNICK/ RANKIN* STANDARD.

The Petitioner's premise must assume that all speech in an employment setting is protected regardless of whether it is on a matter of public concern. Speech, under the Petitioner's "impairment" test, only loses its protected status when the government shows that a particular speech makes it impossible for the government to function as such. Under the Petitioner's proposal, the ability of a governmental agency to function determines whether the speech will be protected by the First Amendment. This is an extremist position, an all-or-nothing proposal that places the onerous burden on the government to show, not that the challenged speech affects the effectiveness of the government, but that it would make it impossible for the government to function.

The Petitioner ignores the fact that speech on matters of public concern is at the core of the First Amendment and receives the most stringent constitutional protection. There is a consensus that if the speech is not of public concern, there is no First Amendment protection against dismissal.[2] The Supreme Court has long held that not all kinds of speech

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[1] Pet. 57.

[2] See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758-758 1985.

underlie the First Amendment.[1] The Petitioner's proposal disregards the distinction between speech on matters of public concern and speech on matters of private concern. This distinction directly addresses the fundamental values of free speech. The Petitioner's proposal is a radical departure from the traditional analysis of First Amendment issues in the employment arena and is not worthy of consideration by the Supreme Court.

C.
THE OPINIONS OF THE FEDERAL COURTS ARE NOT INCONSISTENT.

To persuade the Court that this case should be reviewed, the Petitioner also argues that the case results in the lower courts are inconsistent and irreconcilable in cases deciding that speech involves a matter of public concern. To support this proposition, the Petitioner, without analysis, and with only brief quotes, cites several cases. The common thread that ties these cases together is the courts' search for legitimate speech values in the challenged speech. Deciding whether a particular speech is protected is often not an easy task because the quest is extremely fact oriented. Different fact patterns will inevitably give rise to different results. The cases cited by the Petitioner stand for the proposition that there can be no black and white standard to analyze speech in public employment if one is to consider the competing interests involved. As we shall see, each case must stand on its own merits.

Marshall v. Allen, 984 F.2d 787 (7th Cir. 1993), and *Hall v. Ford*, 856 F.2d 255 (D.C. Cir. 1988), did not reach the merits of the First Amendment claim. *Marshall* is a qualified immunity case where the parties rigorously disputed many of the facts. The Court did not decide the First Amendment issue

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[1] *Id.*, at 758

on the merits, and it only held that in 1988 it was clearly established that verbal and nonverbal support of employees alleging sex discrimination dealt with a matter of public concern. *Hall* resulted from a dismissal under Rule 12(b)(6). On review, all of the allegations in the complaint were taken as true. The court held in *Marshall* that the appellant's allegations that he publicly voiced his concerns about various violations of the rules of the National Collegiate Athletic Association and the University of Columbia alleged a matter of public concern.

Maciariello v. Sumner, 973 F.2d 295 (4th Cir. 1992), and *Buzek v. County of Saunders*, 972 F.2d 992 (8th Cir. 1992), deal with communications to a Judge. In *Maciariello*, the Court of Appeals found that two police officers, while conducting an investigation of their own, not only discussed the suspicion of wrongdoing between themselves, but they went to a Municipal Court Judge and spoke to her about their suspicions. The Court of Appeals found that the conversation was protected speech; however, it held that the conversations were not a "but for" cause of the disciplinary action. In *Buzek*, a Deputy sheriff sent a letter to a Judge on behalf of a criminal defendant. The Court of Appeals found that the proper sentencing of a convicted criminal was a matter of public concern and held the speech was protected because the Defendants did not offer any evidence on the issue of whether the functioning of the sheriff's office had been impaired by the speech.

In *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989), *Conaway v. Smith*, 853 F.2d 789 (10th Cir. 1988), and *Brocknell v. Norton*, 732 F.2d 664 (8th Cir. 1986), the 8th Circuit and the 10th Circuit Court of Appeals addressed First Amendment claims where the Defendants raised the issue that the speech in question was related to a personal matter or dispute. In *Wulf* the protected speech was a letter to the Attorney General of Kansas where the Plaintiff complained about violations of law by city officials. *Conaway* involved three incidents where the Plaintiff sought, verbally and in

writing, to bring to light actual or potential wrongdoing or breach of public trust by public officers. In deciding the issue of speech, the 8th Circuit Court of Appeals in *Brocknell* held that the facts before the court approached more closely the plight of a whistleblower who wished to report the misconduct of the immediate superior. 732 F.2d at 668. In all cases, the appellate courts found that the speech did not involve a private matter. The courts decided these cases in the context of the factual situation presented in each case while staying within the boundaries of the analytical approach of this Court's holding in *Connick*.

D.

THE FIFTH CIRCUIT'S RULING THAT THE PLAINTIFF WAS SPEAKING AS AN EMPLOYEE ON A MATTER OF PRIVATE CONCERN IS NOT INCONSISTENT WITH *CONNICK* AND *RANKIN*.

Resolution of this case did not involve any unsettled question of constitutional law, and the Petitioner argues none. The decision of the Court of Appeals only applied this Court's controlling precedent and applicable constitutional doctrine to the facts presented by the Petitioner.[1] The Court of Appeals found that the Petitioner disputed his role in the internal affairs investigation and that he focused on the issue of corruption only insofar as it impacted his wish to continue his investigation.[2]

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[1] The Fifth Circuit relied on its decision in *Terrell v. University of Texas Sys. Police*. 792 F. 2d 1360 5th Cir. 1986 , *Cert. denied*. 479 U.S. 1064 1987.

[2] The Petitioner does not seek review on the basis that the factual findings of the Court of Appeals are not supported by the summary judgement evidence. Therefore, we must take this finding as correct for the purposes of our argument.

The Court of Appeals held that Petitioner did not speak as a citizen but as an employee embroiled in a personal employee dispute.[2] The Court of Appeals, as mandated by *Connick* and *Rankin*, was deciding, as a threshold question, whether the Petitioner's speech could be fairly characterized as constituting speech on a matter of public concern.

The Petitioner cites several isolated and incomplete statements of the Court of Appeals' decision to support his argument that the court's opinion misapplied *Connick* and *Rankin*. The petitioner, perhaps guided by self interest and by his very own ideological perception of the free speech values, misconstrues the decision of the Court of Appeals. Interestingly, the Petitioner does not argue that a correct application of *Connick* and *Rankin* would have yielded a favorable result to the Petitioner.

The Court of Appeals characterized the speech at issue in the nature of police corruption.[3] The court also held that police corruption was an issue of public concern. However, the court made clear that the "importance" and "content" of the speech, contrary to Petitioner's argument, was not determinative. The Court of Appeals' refusal to limit the analysis to the "content" and "importance" of the speech is consistent with *Connick*.[2]

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[1] App. 10-11. Speech is protected when an employee as a citizen on matters of public concern and not as an employee upon matters only of personal nature. *Connick*, 461 U.S. at 147.

[2] See App. 11. The Petitioner did not allege that his "speech" was in the nature of "police corruption." The Court Of Appeals may have considered that "police corruption" encompassed the speech that Petitioner did raise i.e., allegations of criminal conduct against the Chief of Police and Petitioner's perceived irregularities in the investigation by internal affairs.

[3] Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick*, 461 U.S. at 147-148.

Review of the decision is not justified on the basis that the opinion conflicts with the holding of *Givan v. Western Line Consol. School District*, 439 U.S. 410.[1] While it is true that the speech to which the Petitioner points occurred within the confines of the police department, the lower court found that the Petitioner's expression was related to a personal employment dispute. Speech not concerning a personal grievance is a strong aspect of the *Givan* decision. Recognizing that an employee *qua* citizen need not communicate directly to the public[2], the Court in *Connick* noted that *Givan* applies to an employee who acts as a citizen rather than to an employee who is involved in a personal employment dispute.

The Petitioner suggests that statements of the Court of Appeals that the Petitioner did not complain and went "public," somehow conflict with *Givan*. The petitioner was ordered to make a written statement about his investigation and, thereby, he could have reduced his concerns to writing. He refused to do so three times, conduct that was patently insubordinate. By refusing to make a written statement by which he could bring out his concerns in the context of a formal investigation sanctioned by the City, the Petitioner declined the opportunity to begin to tie down his own concerns, as an employee, to broader concerns of a public nature. It was the Petitioner's refusal to speak up that culminated in the events where he surrendered his badge. The refusal to speak out, to complain and go "public" can only support the Court of Appeal's conclusion that the Petitioner was only engaged in expressing his own dissatisfaction about his role in the investigation. The Petitioner misconstrues the decision if he reads that the Court imposed on the Petitioner, as a requirement for protection, that he go public.

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[1]*Givan* protects speech where an employee speaks out as a citizen on a matter inherently of public concern, not tied to an employment dispute, but arranges to do privately. *Connick*, 461 U.S. at 148 n.8.

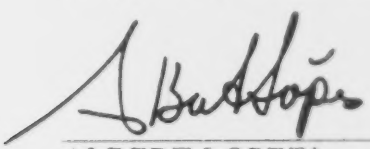
[2]*Connick*, 461 U.S.148 n.8

II.

CONCLUSION

The underlying theme of the Petitioner's Questions Presented is his disagreement with the ideological basis of the precedents of the Supreme Court concerning "speech" within the context of governmental employment. His disagreement permeates his analysis of the lower court cases, as well as the case at bar. The Petitioner does not present "special and important reasons" that would justify review by this Court and, therefore, it should be denied.

Respectfully submitted,



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